In the

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1405

Winthrop Drake Thies,

Appellant

v.

Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts,

Appellee

On Appeal From the Court of Appeals of the State of New York

Motion for Leave to File Brief for the New York County Lawyers' Association as Amicus Curiae and Brief

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April 12, 1979

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Motion for Leave to File Brief for
New York County Lawyer's Association
as Amicus Curiae

The New York County Lawyer's Association moves for leave to file the attached brief amicus curiae in the above-entitled case. This leave is requested on the ground that the Association is in

a position to assist the Court with respect to the issues presented: Whether a New York statute (§ 90(4) of the Judiciary Law) as applied by the New York Court of Appeals to the appellant violates Article 1, Section 10, Clause 1 (ex post facto laws) and the Fourteenth and Eighth Amendments to the Constitution of the United States by retroactive application of a new law to the appellant, depriving him of due process of law and equal protection of the law and by imposing upon him excessive and unusual punishment.

Pursuant to Rule 42(3) of the Revised Rules of this Court, consent to the filing of this brief was requested of the appellant, which was granted, and of the appellee, which was refused. However, the appellee's counsel stated that he would not oppose such filing.

Interest of Amicus Curiae

The New York County Lawyer's Association is a New York not-for-profit corporation whose membership is composed of

more than 10,000 attorneys most of whom practice in the County of New York, but such membership is open as well to lawyers practising in other jurisdictions. The Association has more than 70 committees of lawyers actively engaged in promoting projects of importance to society, the legal profession and the judicial system, including providing voluntary services to the courts, advocating legal reforms, conducting legal educational courses and endorsing programs to establish and maintain the highest professional standards for the judiciary and practising lawyers.

The Committee on Professional Ethics of the Association is deeply concerned over what appears to it to be a serious violation of the appellant's constitutional rights in this case and over the effect such treatment of lawyers may have on the legal profession. That committee and the Board of Directors of the Association have both unanimously directed and approved the filing of this motion and brief.

Accordingly, permission is sought to submit the attached brief.

April 12, 1979

Respectfully submitted,

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BRIEF
For the New York County Lawyers'
Association as Amicus Curiae

Introduction

The appellant was a well regarded practising lawyer in the field of income tax law with an established clientele. He was convicted on November 22, 1976, of an extremely minor offense. The conviction was under a federal law which happens to be labeled a "felony."

Section 90(4) of the New York Judiciary Law provides for automatic disbarment without a hearing if a lawyer is convicted of a "felony". However, at the time of the appellant's conviction, it was the law of New York, and had been for 37 years, that the word "felony" in this statute did not include federal felonies unless they were also cognizable as felonies under New York law. The offense of which this appellant was convicted was a New York misdemeanor, not a felony. Accordingly, at the time of his conviction, he was not subject to the provision for automatic disbarment. In order to disbar him at that time a hearing and consideration of his character and conduct would have been required.

Eleven months after his conviction, the New York Court of Appeals changed the law and held that automatic disbarment applies upon conviction for any federal felony, irrespective

of how petty. The new law was then applied retroactively to the appellant and he was summarily disbarred without being given an opportunity to be heard as to whether the offense of which he was convicted was in any way relevant to his character, conduct or qualification to practice law.

The conduct of the appellant for which he was summarily disbarred without a hearing was exceedingly minor. The trial court called it a "scuffle in the hallway" and a "kindergarten shouting and pushing match" provoked by illegal action on the part of agents of the Federal Bureau of Investigation.

The appellant was engaged in delivering securities to a bank on behalf of a client when he was arrested by agents of the F.B.I. who claimed that he was transporting stolen securities. He was taken before a United States Magistrate who found that the complaint, as drafted, was "insufficient to state probable cause."* Thinking he was free to leave, the appellant tried to do so but the F.B.I. agents

*The charge of transporting stolen securities is not relevant to the case at bar because, although tried and convicted, the appellant's conviction was reversed by the U.S. Court of Appeals for the Third Circuit for lack of federal jurisdiction. Until properly tried, he must be presumed innocent on this issue.

seized him again. He resisted and was forcibly subdued, handcuffed and locked up. The appellant was indicted and tried for resisting the F.B.I. and was found guilty after an instruction to the jury to the effect that even though the conduct of the F.B.I. agents was illegal, the appellant had no right to resist if the F.B.I. agents "subjectively believed" they were acting legally. It is interesting to note that under this instruction, the question of whether the appellant acted properly in resisting the illegal arrest depended not on his mental attitude but on the mental attitude of the F.B.I. agents, something he could not know or control.

Summary of Argument

The New York County Lawyer's Association contends that the appellant was vested with a valuable right in his license to practice law in New York and that this right could not be taken from him (i) by ex post facto application of law created 11 months after his conviction, (ii) without giving him a fair opportunity to be heard as to the miniscule nature of the offense and its irrelevance to his qualifications to practice law, (iii) without affording him rights and protection equal to those accorded to other citizens, or (iv) by imposing a punishment so excessive in relation to the petty nature of the

offense as to be cruel and unusual.

ARGUMENT

1. Ex Post Facto Law

The Penalty of automatic disbarment was imposed pursuant to a law that did not exist at the time of appellant's conviction and was therefore a violation of the Constitutional prohibition against ex post facto laws.

When the appellant was convicted on November 22, 1976, the law of New York was clear. Matter of Donegan, 282 N.Y. 285 (1940), established the principle that automatic disbarment applied only when the conviction was for a New York felony and did not apply to federal felonies cognizable under New York law only as misdemeanors. 282 N.Y. at 292; see also Matter of Levy, 37 N.Y.2d 279 (1975); Turco v. Monroe County Bar Ass'n, 554 F.2d 515, 518 & n. 5 (2d Cir. 1977). The offense of which the appellant was convicted was a misdemeanor under New York law. Accordingly, automatic disbarment did not then apply to him and the appellant was entitled to a hearing on the question of whether his offense involved moral turpitude or any other factor that reflected on his qualification to practice law.

Eleven months later in Matter of Chu,

42 N.Y.2d 490 (1977), the law was changed by the New York Court of Appeals. It was then applied retroactively to the appellant and he was summarily disbarred without any hearing. An unexpected construction or enlargement of a state law effected by court interpretation "operates precisely like an ex post facto law." Marks v. United States, 430 U.S. 188, 191 (1977); Bouie v. City of Columbia, 378 U.S. 347 (1964).

Disbarment is an extremely serious punishment. Spevack v. Klein, 385 U.S. 511, 516 (1966). To change the law and apply punishment retroactively violates the ex post facto prohibitions of Article 1, Section 10, Clause 1 of the Constitution.

2. Due Process

Automatic disbarment for a minor offense without giving the lawyer a fair opportunity to present mitigating circumstances deprives him of a valuable right without due process of law in violation of the Fourteenth Amendment.

The right to practice law is a valuable vested right protected by the due process provisions of the Constitution. Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39, 239 n. 5 (1957); Charlton v. Federal Trade Commission, 543 F.2d 903, 906, 177 U.S. App. D.C. 418 (D.C. Cir. 1976). Once a lawyer has been

admitted to practice by the state authorities, he cannot be disbarred unless it is determined that he no longer has the moral character and integrity required for practice of the law, Ex Parte Garland, 71 U.S. (4 Wall.) 333, 379 (1866).

Conviction of a petty offense that has no reasonable connection with the question of his character and integrity is not a proper basis for making that determination. There must be a reasonable relationship between the condemned conduct of the lawyer and the action taken by the state. Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957).

In any event, determination of a matter as serious as disbarment, which is completely ruinous to a lawyer's career and source of livelihood, cannot be made without giving the lawyer a fair opportunity to be heard. Due process requires that he be allowed to show mitigating circumstances and the absence of any reasonable relationship between the offense and his moral or professional character. Federal courts have so held in the case of federal automatic disbarment rules, e.g., Matter of Jones, 506 F.2d 527 (8th Cir. 1974), and the same rule should apply to the states.

3. Equal Protection

A lawyer is entitled under the Fourteenth Amendment to the same equal protection of the laws as any other person.

A law that punishes a lawyer by automatic disbarment without a hearing deprives him of the right to be treated like others who are subject to punishment. In Spevack v. Klein, 385 U.S. 511 (1966), which held that a lawyer could not be disbarred for claiming the privilege against self-incrimination, this Court noted that "lawyers also enjoy first class citizenship." 385 U.S. at 516.

Common criminals, robbers, and murderers all have the right to present mitigating circumstances before being punished. Green v. United States, 365 U.S. 301, 304-05, reh. den. 365 U.S. 890 (1961); Hill v. United States, 368 U.S. 424, reh. den. 369 U.S. 808 (1962). The New York disbarment statute as interpreted by the New York Court of Appeals is wholly inflexible. The ax falls irrespective of the minuteness of the offense or the mitigating circumstances, no matter how compelling. How can a lawyer, about to be punished for committing a crime by being barred for life from practicing his only form of livelihood and being condemned to social and professional disgrace, be deprived of the right to

show that the crime was so petty and insignificant that it does not reflect on his qualifications to practice? To deprive him of this right is to deny him the protection of the laws that is available to all others.

4. Cruel and Unusual Punishment

To disbar a lawyer automatically for a petty offense is unconstitutional as cruel and unusual punishment.

Under the Eighth Amendment, severity of punishment must be reasonably related to the seriousness of the crime. Estelle v. Gamble, 429 U.S. 97, 103 n. 7 (1976); Gregg v. Georgia, 423 U.S. 153, 173 (1976); Weems v. United States, 217 U.S. 349, 367 (1910). The New York statute is seriously deficient in this respect. The drastic punishment of disbarment is imposed automatically no matter how miniscule the offense. Disbarment destroys a lawyer's whole life, his career, his reputation perhaps built up through years of labor, and his only means of livelihood. He is condemned to social and professional disgrace for life. This terrible punishment is inflicted on a New York lawyer who commits an extremely minor crime only because it is labeled a "felony." Such punishment can be wholly out of proportion to the nature of the offense and wholly unrelated to the lawyer's qualification

to practice law. To inflict it without giving him an opportunity to show mitigating circumstances is constitutionally cruel and unusual.

Conclusion

For the foregoing reasons, the provisions of Section 90(4) of the New York Judiciary Law that impose automatic disbarment without any hearing or consideration of mitigating circumstances are unconstitutional and the decision below should be reversed.*

April 12, 1979

Respectfully submitted,

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*Bills are pending in the New York legislature to overrule Matter of Chu, supra, but no one knows whether or when they will be enacted.